INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	11

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492	9
Glasser v. *United States*, 315 U.S. 60	8
Hagans v. *United States*, 261 F. 2d 924	9
Herron v. *Southern Pacific Co.*, 283 U.S. 91	8
Holland v. *United States*, 348 U.S. 121	10
Quercia v. *United States*, 289 U.S. 466	8
Reynolds v. *United States*, 225 F. 2d 123, certiorari denied, 350 U.S. 914, rehearing denied, 350 U.S. 929	5
Spies v. *United States*, 317 U.S. 492	5
Travis v. *United States*, 364 U.S. 631	4–5
United States v. *Albanese*, 117 F. Supp. 736	6
United States v. *Albanese*, 224 F. 2d 879	5
United States v. *Gross*, 276 F. 2d 816, certiorari denied, 363 U.S. 831	5
United States v. *Hoover*, 233 F. 2d 870	6
United States v. *Johnson*, 123 F. 2d 111	10
United States v. *Sullivan*, 98 F. 2d 79	10
United States v. *Upchurch*, 286 F. 2d 516	9

608006—61

Statutes:
Internal Revenue Code of 1954:
Page
Sec. 446 (26 U.S.C. 446) 10
Sec. 451 (26 U.S.C. 451) 10
Sec. 7201 (26 U.S.C. 7201) 2, 4
18 U.S.C.:
Sec. 1001 4
Sec. 3237 ..... 2, 4, 6
Miscellaneous:
H. Rep. No. 304, 80th Cong., 1st Sess., Revision of 18 U.S.C., Reviser's Notes 6
S. Rep. No. 1952, 85th Cong., 2d Sess 6

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 238

SAMUEL KOWALSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Appendix A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1961 (Pet. Appendix A), and a petition for rehearing was denied on June 22, 1961 (Pet. Appendix C). The petition for a writ of certiorari was filed on July 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for willful attempt to evade taxes, venue was properly laid in the

district where the false and fraudulent returns were prepared.

2. Whether the trial judge's conduct was impartial.

3. Whether the government adequately met its burden of proof with respect to petitioner's method of accounting for income.

STATUTES INVOLVED

18 U.S.C.:

> SEC. 3237 [as amended by the Act of August 6, 1958, 72 Stat. 512]. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.
>
> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner, a certified public accountant in Laredo, Texas (R. 1000–1001), was indicted in the Southern District of Texas in three counts for the willfully

attempted evasion of income taxes owed by him and his wife for the years 1954, 1955 and 1956. (R. 5.) Each count charged that petitioner attempted to evade the tax by preparing and causing to be prepared at Laredo (in the Southern District of Texas) and filing and causing to be filed with the District Director of Internal Revenue at Austin (in the Western District of Texas) a false and fraudulent income tax return for each of the prosecution years, understating in each return the net taxable income received and the tax due on that income, in violation of Section 7201 of the Internal Revenue Code of 1954. (R. 57–61.)

The evidence showed that petitioner received income during the years involved in the form of checks and cash. (R. 1029; 1205–1208.) He deposited some checks to bank accounts in Laredo; others to savings accounts in San Antonio. (R. 1025–1026; 1064–1078; 1192–1195; 1228.) He purchased bank money orders in Laredo (R. 1196), which he later deposited to his San Antonio savings accounts (R. 1070–1072.) The funds deposited in San Antonio were omitted from his reported income and from the records from which the returns were prepared. (R. 709; 1206–1207; 1228.) Petitioner's wife testified that she had forgotten these items when she prepared the records on which the returns were based (R. 1228), and that her husband had never questioned her regarding them. (R. 1002; 1016; 1231–1232.) Petitioner did not take the witness stand.

The jury acquitted with respect to the first count and convicted with respect to the other two. (R.

1372.) In affirming the conviction, the court of appeals rejected all of petitioner's present contentions. (Pet. App. A.)

ARGUMENT

I

Petitioner's first contention (Pet. 8–14) is that venue in the Southern District of Texas was improper. This assertion is conclusively answered by the words of the applicable venue provision, 18 U.S.C. 3237(a) (*supra*, p. 2), which provides in pertinent part that "* * * any offense against the United States begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed."

Petitioner was indicted, tried, and convicted under Section 7201 of the Internal Revenue Code of 1954, *supra*, for willfully attempting to evade payment of tax. An important part of the acts alleged and proved at trial consisted of his preparation of false returns at his residence in Laredo, from which a clear inference of a willful attempt to evade taxes could be drawn, and was drawn by the jury. It is difficult to understand how it can be argued that, upon these facts, petitioner's crime was neither begun nor committed in part in the Southern District of Texas.

Petitioner attempts to draw an analogy to *Travis* v. *United States*, 364 U.S. 631. (Pet. 13.) There, a conviction was obtained under 18 U.S.C. 1001 for knowingly making a false statement "in any matter within the jurisdiction of any department or agency

of the United States." The statement in question was a non-Communist affidavit required by Section 9(h) of the National Labor Relations Act. This Court held (364 U.S. at 635–637) that the filing of the statement was a condition precedent to Labor Board jurisdiction, and that, therefore, the *locus* for purposes of venue was "carefully specified" by Congress to be the place of filing.

In direct contrast, the filing of a statement or return is not a necessary condition to an attempt to evade taxes under Section 7201 of the 1954 Code. Such attempted evasion may be proved, for example, by evidence showing the keeping of two sets of books, the making of false entries or invoices, destruction of records, or concealment of assets. See *Spies* v. *United States,* 317 U.S. 492, 499. "Where Congress is not explicit, 'the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it'. *United States* v. *Anderson,* 328 U.S. 699, 703." *Travis* v. *United States, supra,* p. 635. It is uncontroverted that the offense began in Laredo with the preparation of the false returns and continued through the filing of these returns in Austin, and venue was properly established wherever an affirmative act of evasion occurred. *Reynolds* v. *United States,* 225 F. 2d 123 (C.A. 5th), certiorari denied, 350 U.S. 914, rehearing denied, 350 U.S. 929; *United States* v. *Albanese,* 224 F. 2d 879 (C.A. 2d); *United States* v. *Gross,* 276 F. 2d 816 (C.A. 2d), certiorari denied, 363 U.S. 831.

It is worthy of note that the petitioner here is seeking to defeat venue laid in his home district. The

very purpose of Section 3237 [1] and its amendment by the Act of August 6, 1958 (see p. 2, *supra*),[2] was to provide the defendant with the opportunity to be tried at his place of residence whenever constitutionally permissible. In this case, as in many others, the government chose to prosecute in petitioner's home district rather than in the district where the District Director was located, partly to facilitate the calling of witnesses. The statute clearly provides that venue was proper in the district where the false returns were prepared and signed. *United States* v. *Hoover*, 233 F. 2d 870 (C.A. 3d); *United States* v. *Albanese*, 117 F. Supp. 736 (S.D.N.Y.).

The petitioner's other two suggested interpretations of Section 3237—(1) that all the elements of a completed attempt must be performed in the district in

[1] H. Rep. No. 304, 80th Cong., 1st Sess. (Revision of 18 U.S.C., Reviser's Notes, Appendix, p. A 161):
"The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts * * *."

[2] In the Act of August 6, 1958, Congress added subsection (b) to Section 3237 which provided, *inter alia*, that in prosecutions arising under Section 7201 of the 1954 Code the defendant be given an opportunity to remove the case to his district of residence if venue was laid elsewhere. The purpose of the amendment was to insure that wherever possible the defendant be prosecuted in his home district because "the acts for which the defendant is really being tried are generally committed in the district in which he resides and certainly bear little or no relationship to the place where his tax return is received." S. Rep. No. 1952, 85th Cong., 2d Sess., p. 2. Yet, in direct contradiction to this policy, petitioner here is arguing that the government cannot under *any* circumstances bring a Section 7201 prosecution in a defendant's district of residence if his returns were filed elsewhere.

which venue is laid, and (2) that mailing is necessary in order to bring an offense within the venue provision—are refuted by any fair reading of the statutory language.

II

Petitioner claims (Pet. 14–20) that the conduct of the trial judge in cross-examining a defense witness (petitioner's wife) was so devoid of impartiality as to infringe petitioner's constitutional rights. He refers to one incident at the trial in order to prove the alleged misconduct. Mrs. Kowalsky upon redirect examination had stated that the reason she failed to include checks that were deposited in savings accounts on her husband's work papers was that she "just forgot." (R. 1228.) No further questions were asked by counsel in order to explain, augment, define, or modify this assertion. The trial judge therefore attempted to obtain further elucidation in the following colloquy (R. 1231):

> Q. All right. You knew, if I understand you correctly, that that money was fees for his services?
>
> A. Yes, sir.
>
> Q. And you knew it should have been reported, didn't you?
>
> A. Yes, sir.
>
> Q. And for three years, and with a great many thousand dollars involved, you are telling me you just forgot it?
>
> A. Well, when my husband would come from San Antonio, he would give me the pass book, I would bring it back to the bank. And at the time when my husband would come home on

> April 15th, to prepare the tax return, I would give him these work papers, and he would ask me, "Is this all the information that we need for our tax return?" And I said, "Yes, as far as I know, this is all there."
>
> I made no notation on our work sheet, from which my husband prepared the tax return.

It is difficult to perceive from this conversation any partiality on the part of the trial judge. His questions did not destroy an alleged defense, but rather elicited a detailed explanatory statement that had not theretofore been adequately presented to the jury. The trial judge gave no indication of his opinion as to the evidence presented or as to the credibility of Mrs. Kowalsky. His interrogation of the witness permitted her fully to explain the defense of mistake and forgetfulness on which petitioner relied. (R. 1229–1235.)

The role of a federal trial judge is not that of a mere moderator; he is actively to govern the trial and assure its proper conduct. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95; *Quercia* v. *United States*, 289 U.S. 466, 469. This Court has endorsed the prerogative of the trial judge to interrogate witnesses in order to elicit the complete facts. *Glasser* v. *United States*, 315 U.S. 60, 82.

The trial judge in the instant case made special effort to insure that the jury would draw no inferences from the fact that he questioned the witness. In compliance with petitioner's request, the jury was so instructed as part of the charge. (R. 1287.)

In short, to require less participation in a trial than

is here set forth in the record (R. 1229–1235) would render virtually meaningless the power of a federal judge to interrogate witnesses, and would drastically limit his ability to clarify facts presented to the jury.

III

Petitioner contends (Pet. 6) that the trial judge's request that the jury deliberate further after an indication of deadlock was an independent denial of a fair trial. The judge said (R. 1318):

> I am going to ask you, please, to return and give the matter further careful thought. After a while, *later in the day,* if you tell me you are unable to reach a verdict, *I shall excuse you and declare a mistrial.* [Emphasis supplied.]

Thereupon, the jury withdrew and considered the case further, reaching its verdict that afternoon.

The court refrained from learning the nature of the division of the jury, and made it clear that the jurymen were under no coercion from the court to reach any decision of which they were not convinced. (R. 1313–1319.) Instructions by the trial judge to a deadlocked jury to give the case further consideration are commonplace in the federal courts, and have been approved as such. *Allen* v. *United States,* 164 U.S. 492, 501; *Hagans* v. *United States,* 261 F. 2d 924 (C.A. 5th); *United States* v. *Upchurch,* 286 F. 2d 516 (C.A. 4th). The judge's statement that he would declare a mistrial if a verdict were not soon reached eliminated any possibility that the jury may have felt coerced to seek unanimity.

IV

Petitioner finally contends that the government failed to prove his method of reporting income. He relies on a faulty analogy to certain net worth cases (*Holland* v. *United States*, 348 U.S. 121; *United States* v. *Sullivan*, 98 F. 2d 79 (C.A. 2d); *United States* v. *Johnson*, 123 F. 2d 111 (C.A. 7th)), in asserting that the requisite burden of proof was not met. However, these cases stand only for the proposition that when the government attempts to prove tax evasion by an increase in the net worth of the taxpayer, it must be proved that such increase occurred in a particular year in order to infer that there was unreported income in that year.

The present case stands in sharp contrast to the "net worth" cases. The government has shown by positive evidence that numerous *specific items* of income paid to the petitioner on specified dates for services rendered (R. 81–704) were not reported on his tax return for that year. Petitioner, a certified public accountant, did not keep a regular set of books (R. 1002–10). According to his wife's testimony, the returns were based upon calculations derived from work papers (R. 1016) and certain (although not all) bank deposits (R. 1206–07, 1228).

The general rule of accounting of Section 451(a) of the Internal Revenue Code of 1954, is that items of income must be included in returns for the year in which they were received.[3] If the government had

[3] To be sure, the taxpayer had an option to set up his books and compute his income under a variety of accounting methods authorized by Section 446(a), 1954 Code. But this section does

any burden of showing the nature of the accounting system utilized by the taxpayer in making out its prima facie case, that burden was met by the evidence indicating that petitioner did not use any settled method of accounting by which the income would be reported in a year other than that in which it was received. Petitioner's returns on their face illustrate normal cash-basis accounting with the exception of the omissions of the specific items for which he was convicted. Consequently, there is no basis for asserting that there was any deficiency in the government's proof.

CONCLUSION

No novel issue of law is presented by the petition, nor are the courts of appeals of the several circuits in disharmony in their treatment of any of the issues urged. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1961.

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not permit a taxpayer to avoid taxation simply by failing to keep books, nor does it require the government in such a case to establish a particular method of accounting as having been employed. The government surely is not prevented from collecting taxes due until the taxpayer exercises his option of choosing a method of accounting.

U.S. GOVERNMENT PRINTING OFFICE 1961